FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 19 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 874

NELSON H. LEO, doing business as OVERSEAS ASSOCIATED CORPORATION,

Respondent,

against

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Petitioner.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANCIS A. BRICK, JR.
ROBERT M. LOEFFLER,
THOMAS J. GARRITY,
Attorneys for Respondent,
Two Wall Street,
New York 5, N. Y.

In association with
HONORIO POBLADOR, JR.,
of Manila, Republic of the Philippines.

INDEX

	PAGE
Opinion Below	1
Questions Presented	1
Statement of the Case	2
The Facts	2
Conduct of the Trial	4
The Court's Charge with Respect to Total Loss	8
Reasons for Denying the Writ	10
Conclusion	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 874

NELSON H. LEO, doing business as
OVERSEAS ASSOCIATED CORPORATION,
Respondent,

against

INSURANCE COMPANY OF NORTH AMERICA,
a Pennsylvania Corporation,
Petitioner.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

Respondent brought this action in the District Court for the Southern District of New York on January 18, 1955 upon a valued policy of marine insurance. Following a nine day trial a jury verdict in plaintiff's favor was rendered for the face amount of the policy, $300,000. On appeal, the Court of Appeals for the Second Circuit unanimously affirmed. Its decision was handed down on March 8, 1960 and is reported at 275 F. 2d 766.

Questions Presented

1. Whether certain remarks of the Trial Judge complained of by defendant-petitioner, when taken in context, precluded defendant from having had a fair and impartial trial.

2. Whether there was evidence of a *bona fide* partial loss which would require submission of such an issue to the jury.

Statement of the Case

The issues sought to be raised before this Court by the petition were disposed of by the court below after reviewing an extensive record. It is believed that a more complete statement than that contained in the petition of the facts, the conduct of the trial, and the issues disposed of by the findings of the jury and reviewed by the courts below, will be itself sufficient to disclose the absence of any merit in the questions sought to be raised by the petition.

The Facts.

In July, 1953 one I. H. Appel purchased from plaintiff Nelson H. Leo several lots of machinery and spare parts (listed on the inventory thereof (Exh. 3, 502A-561A))* located in a warehouse outside of Manila for a price of $326,480.38. The price had been arrived at by a physical inventory of the goods catalogued item by item at prevailing wholesale prices (10A, 13A; 68A-75A, 80-1A voir dire 81-9A; 94A, 97A, 110-1A; 167-8A). Appel had purchased the goods for the purpose of establishing a machine shop and parts depot in Davao on the southern island of Mindanao (6A-7A, 75A).

In August, 1953, Louis P. Nuber of E. E. Elser & Company, insurance brokers in Manila, acting in behalf of Appel, applied to defendant's Manila agent, Karl Reed, for quotation of a rate for a $300,000 valued policy covering the shipment of the goods from Manila to Davao (Exh. W, 619A; 17-18A; 132-3A). After an exchange of correspondence Reed quoted a premium and requested his home

* Figures followed by "a" refer to pages of appellant's appendix, Volume I of certified record. Figures followed by "A" refer to pages of appellee's appendix, Volume II of certified record. Figures preceded by "App." refer to appendix to the petition.

office to issue the policy (Exh. 47 615A). In his correspondence with Reed, Nuber volunteered that the approximate tonnage of the shipment was "between 300 and 350 tons" (Exh. W, 619A). Reed, however, had made no inquiry with respect to the weight, and made no reference to it in his correspondence with the home office of defendant requesting the issuance of the policy. The defendant was at all times advised that the shipment would be in a single voyage aboard a converted LCT (Exhs. X and Y, 620A and 622A; Exh. 46, 614A), which, as a matter of readily available information, has a cargo capacity of only about 150 tons (121A; 153A). In September Appel received from defendant's Philadelphia office the policy in suit which assured Mr. I. H. Appel for an interest in irrigation and road-building machinery, equipment and spare parts, valued at $300,000, on a single voyage by an approved barge in tow from Manila to Davao, P. I. (Exhs. 6 and 8; 567A and 569A; 17-9A).

In the late summer and fall of 1953 the goods were rechecked, cleaned and repacked for shipment to Davao (16A; 77A-81A, 89A-90A). During this procedure a packing list (Exh. 22, 580A-612A) was prepared which reflected the approximate weight in kilograms of the entire shipment (78A-80A, 91-2A). A comparison of the inventory (Exh. 3, 502A-561A) with the packing list shows that all items on the inventory were placed into 636 numbered crates which, in all, were estimated to weight 108,117 kilos or about 117 short tons. The weight estimate on the packing list was confirmed by plaintiff's expert appraiser (146-50A) who independently investigated the weights of the items listed on the inventory by direct recourse to manufacturers' weight specifications; the weight estimate also corresponds to the calculations of the weight of the cargo on board the LCT 732 (152A-153A).

In November and December, 1953 the LCT 732 was reconditioned under the direction of marine surveyors (Exh. 27) and the Philippine Bureau of Customs (Exh. 28 and 37; 35A-40A; 48-9A) and approved by both for the voyage

(Exh. 15, 571A; Exh. 29). In the latter part of December, 1953 the barge was loaded and a loading survey was issued by the marine surveyors which attested to the proper loading and stowage of all 636 cases and crates of machinery and machinery parts (Exh. 17, 574A; 16A, 20-2A; 28A-33A, 41-2A, 49A; 115-9A; 119-123A; 70-1a; 87a).

In the early morning of December 30, 1953 the tug with the LCT 732 in tow cleared Manila. That night the wind kicked up and the barge was subjected to considerable strain. On the following morning the barge developed a list, and while being towed toward the coast by the tug in the hope of beaching the barge, it capsized and sank in 48 fathoms. No part of the cargo was ever recovered (Tr. 161-179, 294-305, 375-392).

Appel still owed Leo, the plaintiff, $300,000 on the purchase price of the goods, which was represented by a promissory note given in part payment of the goods (Exh. 5, 566A). The matter was resolved by Appel assigning to Leo his interest in the policy in cancellation of the note (Exhs. 20 and H, 577A; 61-3A; 92-93A).

Conduct of the Trial.

At the trial defendant's fundamental and constant defense was that the loss was not one occasioned by perils of the sea covered under the policy because the whole transaction from its inception was a scheme to defraud the insurance company. This defense—never raised in the pleadings—was asserted in defendant's opening statement ("We don't hesitate to say that this transaction was infested with fraud") without, however, any specification then or later of the manner in which it contended fraud was committed or any specification of the conduct which it contended constituted fraud. This contention of fraud was also asserted by defense counsel, in the jury's presence, during colloquies with the Court in connection with the relevance of evidence. It was the primary grounds of defense argued to the jury in defendant's summation.

Defendant rested its case without introducing any explicit testimony of fraud or adopting any single version of the facts. At no time did the defendant specify the respects in which it contended the transaction was fraudulent, and the Court was consequently impelled to inquire from time to time as to the theory of the defense in order to determine the particular lines of inquiry and in order to frame the issues for the jury. Late in the seventh day of the trial, after the defense had closed, the Court was led to inquire:

> "In short, you are talking in general terms of fraud, but what kind of fraud, and of what particular relevance to the issues in the case?" (162A)

Earlier the same day during cross-examination of plaintiff's expert, the Court had been obliged to rebuke defense counsel for continuing to follow a scattershot defense:

> "Mr. Leibell, if you only would get someplace where you would really have something that you are saying as a defense to this claim, I think it would be appreciated.
>
> . . . . . .
>
> "You are wandering all over the lot. One moment you send a diver down and you can't even find it. Another moment you are talking about whether the ship was properly repaired, which makes no difference as to the insurance policy." (154A)

The Trial Judge then explained that his purpose was to determine which issues of fact defendant was contesting:

> "Those comments are made by me to try to speed this case up and point up the issues in this case." (154A)

When later, the Trial Judge asked the relevancy of defense questions concerning whether or not, during the gale, the captain of the tug should have shortened the towline, defense counsel—in the presence of the jury—stated he had "treated this whole thing right from the time of my

opening statement as a phony fraudulent transaction" (156A).

It is in this context and background that the particular comments complained of by the defendant as warranting the attention of this Court, must be viewed. On rebuttal when plaintiff offered evidence, relating to certain telephone numbers on a document, to preclude a summation argument by defendant on a point which had become apparent to plaintiff's counsel although never disclosed to the Court by defendant, the following colloquy took place:

> "Mr. Leibell: I object to it as being new material.
>
> The Court: What difference does it make?
>
> Mr. Howell: Your Honor, not ten minutes ago Mr. Leibell stood here and said that this was a fraudulent case. When he introduced this document in evidence after Mr. Appel left the stand for the first time I understood what the real defense in this case was.
>
> The Court: If you understand it you are ahead of me." (160A)

It is clear that the Trial Judge, understandably puzzled, was simply attempting to determine the defense theory. He made a special effort to insure that the jury would not infer that he was in any way disparaging the defense by immediately continuing:

> "My comment was a comment on my own ignorance of your defense, not as a characterization of it. But I have been unable to get in mind what you are driving at." (160A)

Defense counsel moved for a mistrial shortly thereafter. In denying it the Court pointed out:

> "Mr. Leibell, when I try to find out what a defense is so that the court and the jury can find out about it, I am usually regarded as doing something helpful to the defense, because I am trying to find out what their defense is so that we can be guided accordingly.

"Now, you seem to take offense in my trying to find out what your defense is. Your motion is denied.

Mr. Leibell: May I have one moment to tell your Honor the nature of our defense?

The Court: You have had two weeks to explain your defense and I am still puzzled as to exactly what your defense is, Mr. Leibell." (161-2A)

The Court continued in its attempt to obtain a statement of the defense's theory of the facts, during which this exchange took place:

"Mr. Leibell: The basic position we have——

The Court: Is that you do not want to pay the money. That is your basic position here, isn't it?" (163A)

At the Court's invitation after the interjection of the above remark, which was obviously intended humorously, defense counsel resumed his summation of his version of the issues, in the jury's presence, after which the Court commented:

"The Court: All right, you go ahead. Mr. Leibell has helped to get some of the things into focus anyway." (165A)

As well as during the trial, the Court, in its charge to the jury, made abundantly clear the absence of any intent to influence its verdict, first by delineating the respective functions of Court and jury:

"Just as I am the exclusive judge of the law, so you, the members of the jury, are the exclusive judges of the facts. As the sole and exclusive judges of the facts, you and you alone determine the weight, the effect, the value of the evidence and the credibility of the witnesses; and on that basis you will decide the issues of fact which I will submit to you." (188A)

And then by carefully instructing the jury to disregard any colloquies:

"I have sought to avoid any comments which might suggest my personal views on the evidence.

> You are not to assume that I have any views, other than I have indicated in these instructions to you.
>
> . . .
>
> The actions of the Court during the trial in ruling upon motions, or in overruling objections, or in sustaining objections, or in statements to counsel, or in attempting to set forth the law in these instructions, are not to be taken by you as any indication of any determination of the issues of fact by me. These matters upon which I have ruled are matters of procedure and law with which the jury has no concern. You are the judges of the facts." (199A)

The same comments of the Trial Judge which are urged by petitioner as a reason for the issuance of a writ of certiorari were also urged by it before the Court of Appeals as a ground for reversal. After a full review of the record before it, the Court of Appeals quite properly observed:

> "That the Judge had been unable to get a clear understanding of the issues was natural, since so many defenses were suggested or hinted at but no substantial evidence was offered to support them. It was high time that the issues be defined for the Judge and the jury, and it was proper for the Judge to insist that they be defined." (App. 7)

The Court of Appeals accordingly quite properly ruled that the comments could not have "made an impression on the jury which affected the outcome of the case" (App. 7). Upon the record as a whole, there can be no doubt that defendant had a fair and impartial trial.

The Court's Charge with Respect to Total Loss.

In its petition the defendant complains of the Trial Judge's charge that if the jury found for the plaintiff, the recovery should be for the face value of the policy. The defendant objects to the failure of the Trial Judge to authorize a partial recovery for the plaintiff upon a theory of a partial loss, i.e., a total loss of a shipment of only part of the goods insured.

The Trial Judge at no time held, as petitioner implies, that plaintiff could recover the full amount of the policy if a part of the goods insured were not shipped. No rulings were predicated upon such a theory. On the contrary, the jury was instructed to find for the plaintiff only if they found "that the goods were loaded on the barge for the voyage which was insured" (191A); "that the goods were shipped on the barge" (191A); "that the goods were in existence, were loaded on the barge, . . ." (192A); and "that the cargo shipped on the barge was the cargo insured" (196A). Furthermore he specifically charged that "It (the defendant) contends that the goods, or a substantial part of them, were not actually shipped on the barge" (192A), and then instructed the jury to decide for the defendant if they found "that the goods were not shipped on the barge" (196A, 197A).

The fact of the matter is that the particular items of evidence referred to by defendant in its petition (pp. 19-20), as supposed support for a finding that a substantial part of the goods insured had not been shipped, were necessarily submitted to the jury under the foregoing instructions and additional instructions with respect to the defendant's claim of fraud under charges (188A-201A) requiring a verdict for the defendant if the evidence of substantial omission from the shipment of part of the goods insured could be believed. The jury has already passed upon the defendant's contention and rejected it. It is unnecessary here to discuss defendant's characterization of the items in its petition, or their weight or credibility; the same distilled items were urged by defendant before the Court of Appeals, were treated at length by plaintiff in its brief before the Court of Appeals (pp. 29-35), and after a full review of all of the evidence bearing upon the issue the Court of Appeals aptly appraised defendant's contention as follows: "There was no evidence that less than all of the goods covered by the insurance were shipped" (App. 6). What petitioner now asks this Court to do is to review the entire record of a nine day trial to determine whether there was

sufficient evidence on a particular question of fact to warrant its submission to the jury under special instructions, after both the Trial Court and the Court of Appeals have already decided the question in the negative.

Reasons for Denying the Writ

The petition raises no issues of a nature or of sufficient importance to warrant the attention of this Court. The decision of the Court of Appeals adequately and completely disposes of the contentions which petitioner would raise before this Court, and no substantial question exists as to the correctness of the decision of the Court below.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS A. BRICK, JR.,
ROBERT M. LOEFFLER,
THOMAS J. GARRITY,
Attorneys for Respondent,
Two Wall Street,
New York 5, N. Y.

In association with:
HONORIO POBLADOR, JR.,
of Manila, Republic of the Philippines.